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No. 77-612

IN THE

Supreme Court of the United States

October Term, 1977

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS,
Respondents,

and

EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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Introduction

In its Petition, the UMWA comprehensively described the background of this litigation and set forth the numerous areas of conflict between the Third Circuit's decision and decisions of this Court and other Courts of Appeals with respect to important questions

of Federal law. Respondents have filed a Brief in Opposition to the Petition. Petitioner would not further burden the Court but for the unusually misleading portrayal of the record and decisions below presented by the Respondents and several thinly-veiled but vital concessions by which Respondents seek to disassociate themselves from particular positions taken by the Court of Appeals. This Reply is limited to a concise rebuttal.

Statement of the Case

Respondents' characterization of the District Court's findings and of the record evidence (Respondents' Br., p. 3) is notable both for its omissions and its misstatements. Respondents' recitation overlooks the District Court's findings that the large operator delinquencies to the Anthracite Fund occurred incident to an industrial collapse of monumentally catastrophic proportions (54a-56a); that the UMWA made generous loans to the Anthracite Fund which were never repaid and have for the most part been forgiven of almost $10,000,000, approximately the amount of the operator delinquencies, so that pension payments to the Fund's beneficiaries could continue without interruption (70a, 154a); that the Union's close involvement with the Fund's affairs stemming in part from the fact that two of the three Fund Trustees were until 1967 Union officials, was found by the District Court to have worked to the Fund's benefit and no way to its harm (154a); that the Fund Trustees' initial action in not pursuing a vigorous litigation policy to collect operator delinquencies was found to be a reasonable response to the difficult circumstances which they encountered incident to the Anthracite industry's collapse (121a-122a, 131a-136a); that the Fund Trustees' policies were adopted in good faith (136a); that while the Trustees were deemed negligent in waiting too long before assuming

a more vigorous litigation policy, neither they nor the Union had committed an intentional breach of trust in this regard (139a-148a, 154a); and, perhaps most important, that the Trustees were not union agents and that there was no factual basis for imputing liability to the Union for their conduct (147a, 158a). Specifically, contrary to Respondents' characterization, the District Court refused to hold that the Union and the Fund Trustees had withheld vigorous enforcement action because such action might result in working miners losing their jobs (114a-117a), and explicitly noted evidence that the Trustees were motivated in part by a desire to preserve the current level of Fund royalty income.

While Petitioner can well understand Respondents' reasons for wishing to obscure the dire circumstances in which the operator delinquencies arose and the Union's unstintingly generous response to those circumstances, the District Court's findings in these respects were not rejected as "clearly erroneous" by the Court of Appeals and necessarily govern this Court's approach to the case.

Reasons For Granting The Writ

As set forth in the Petition, the Third Circuit's decision, in conflict with numerous decisions by other Courts of Appeals as well as by this Court, purported to open the way for establishment of a Federal common law of pension and welfare trust fund administration adjudicable under Sections 301 and 302 of the Labor-Management Relations Act, 29 U.S.C. 185 and 186, and, contrary to this Court's decision in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), extended the duty of fair representation to Respondent-retirees even though they are not employees within a union-represented bargaining unit (Petition Parts I and II). Additionally, as set forth

in the Petition, the Third Circuit's decision disposed of threshhold issues bearing on the Union's liability under the various Federal claims and its entitlement to credit for unpaid loans to the Anthracite Fund contrary to the decisions of other Courts of Appeals and this Court (Petition, Part III).

Despite the Third Circuit's acknowledgment of conflict (19a), the Respondents understandably seek to downplay the Court of Appeals' holding and minimize its significance. They seek to portray the holdings as merely an affirmation of pendent jurisdiction and attempt to ignore the Court of Appeals' more extravagant jurisdictional theories as mere *dicta* and matters of detail. They suggest that the decision lacks prospective significance in view of the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, which for the future extends federal jurisdiction and substantive standards to matters of pension fund fiduciary breach. None of these contentions will withstand even cursory analysis.

I. RESPONDENTS ADMIT THAT A CIRCUIT CONFLICT EXISTS AND TACITLY CONCEDE THAT THE DECISION BELOW COLLIDES WITH PREVIOUS DECISIONS OF THIS COURT.

While Respondents seek to downplay its significance, they do admit at least grudgingly the existence of circuit conflict:

> "It is true that all of the observations of the various Courts of Appeals regarding the meaning and scope of LMRA § 301 and § 302 are not entirely harmonious, and in view of the nature of those sections and the complexity of the problems with which they deal, it would be surprising were the situation otherwise." (Respondents' Br., pp. 10-11).

While acknowledging that they "found themselves in a jurisdictional thicket" (Respondents' Br., p. 14), Respondents are not similarly candid in addressing the questions of conflict with this Court's decisions regarding the scope of federal jurisdiction under Section 302(e) and that of the federal statutory duty of fair representation. They seek to distinguish *Arroyo* v. *United States*, 359 U.S. 419 (1959) (see *infra*, pp. 8-9), but do not attempt to reconcile the Third Court's declaration of an implied damage action with the preclusive effect of *Arroyo's* holding that defalcating trustees were not to be held accountable under federal law except by way of the injunctive remedy provided in Section 302(e), 359 U.S. at 427. Similarly they make no attempt to reconcile the Court of Appeals' extension of the duty of fair representation to non-employees outside the bargaining unit with the many decisions of this Court which limit the duty to unit employees, cf. *Emporium Capwell Co.* v. *Western Addition Comm. Org.*, 420 U.S. 50 (1975). While Respondents attempt to distinguish *Pittsburgh Plate Glass*, that decision's holding that retirees are not bargaining unit employees—coupled with this Court's decisions addressing the scope of the duty of fair representation—absolutely forecloses federal jurisdiction of their fair representation claim.

Respondents' express admissions of circuit conflict and tacit concessions of conflict with this Court's decisions amply justify the granting of certiorari review.

II. RESPONDENTS' EFFORTS TO MINIMIZE THE EFFECT OF THE CIRCUIT CONFLICT AND TO OBSCURE THE CLASH WITH THIS COURT'S DECISIONS ARE UNAVAILING.

A. The Third Circuit's expansion of federal jurisdiction under Sections 301 and 302 of LMRA and the duty of fair representation is unprecedented and cannot be ignored as simply establishing a predicate for pendent state claims.

Even if the Third Circuit's holding were really "carefully restricted" to a finding of pendent jurisdiction as Respondents seek to portray it (Respondents' Br., pp. 1, 5), it would nevertheless call for this Court's review. As set forth in the Petition, no substantial claim is made under Section 301 absent assertion of a contract breach (Petition pp. 32-38). Nor can a substantial duty of fair representation claim be made by Plaintiffs who are not "employees", 29 U.S.C. 152(2), within a union-represented bargaining unit. (Petition 38-46). To the same effect, no substantial claim of federal jurisdiction is made under Section 302 where the only ostensible structural violation had been corrected prior to the assertion of jurisdiction thereunder and the relief sought was limited to a claim for damages, rather than for injunctive relief, to prevent or correct a Section 302 violation, the sole remedy provided by Section 302(e) (Petition, pp. 20-32). Even a genuinely narrow holding that Respondents' jurisdictional theories were sufficiently substantial to support pendent jurisdiction, would be so contrary to prior decisions by this Court and other Courts of Appeals as to demand this Court's review.

In this case, however, a cursory reading of the Third Circuit's decision confirms that it is not by any means restricted to a finding of pendent jurisdiction. The Third Circuit was hardly restricting itself to a finding of pendent jurisdiction when it discoursed at considerable length regarding the extension of Section 301 to a suit alleging tortious interference with contractual rights and fiduciary breach in the administration of a pension fund; indeed, the Court of Appeals specifically disagreed with the District Court's conclusion that jurisdiction under Section 301 was lacking (8a-12a). Equally outside the bounds of a narrow holding on pendent jurisdiction was the Court's detailed elaboration declaring the existence of an implied federal damage action under Section 302(e) (21a-29a), a position which Respondents themselves did not advocate below and have not sought to defend here.

Similarly, the Court of Appeals was not restricting itself to pendent jurisdiction when it declared that the federal statutory duty of fair representation extends to "minorities inside *and outside* the bargaining unit." (Emphasis added.) (15a). Respondents' contention that the Court of Appeals restricted itself to a finding of pendent jurisdiction would be far more persuasive had the Court proceeded to hold federal jurisdiction lacking despite the declared substantiality of the claims. It did not do so.[1]

In this case, the Court of Appeals' escapade with federal jurisdictional theory is so unfounded that it would amply justify this Court's review even were it genuinely only a predicate for a finding of pendent juris-

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[1] The repeated protestations by the court below, euphemistically characterizing Respondents' federal claims as sufficiently substantial to support federal jurisdiction belie its own understanding of the tenuousness of the federal theories and awareness of the lack of decisional support therefor. At any rate, however, the Third Circuit let slip the veil in its discussion of the merits by declaring that the Union could be held liable, not merely under state law, but *as a matter of federal law* under the same fiduciary standards which would obtain under the state law of trusts (36a).

diction. Any fair reading of the Court of Appeals' decision in this case confirms, however, that contrary to the Respondents' characterization, it declares new bases both for federal jurisdiction and for imposition of liability.

B. The conflict between the decision below and the decisions of this Court and various Courts of Appeals is not confined to *dicta*.

Just as the Court of Appeals' holding cannot be minimized as merely a finding that the federal claims were not substantial, its observations regarding the scope of federal jurisdiction in connection with this litigation cannot be discounted as mere *dicta*. Nor can the disparities with other decisions be minimized in significance as mere matters of detail as Respondents seek to do (Respondents Br., pp. 8-13). As set forth in the Petition, the Third Circuit in this case has purported to open the way for development, under the auspices of the Labor-Management Relations Act, of a federal common law of pension and welfare trust fund administration. It has done so wholly without guidance and authorization by this Court. Its invocation of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), in this regard, is supported only by law review articles by isolated commentators (9a) and is contrary to the decisions of several other Courts of Appeals including the First, Second, Fifth, Sixth, Seventh, and Eighth Circuits (Petition pp. 18-19), as well as to this Court's decision in *Arroyo* v. *United States*, 359 U.S. 419 (1959). Respondents attempt to distinguish *Arroyo* as precluding merely *criminal* liability for embezzlement from a Section 302(c)(5) fund. Such a reading is contrary both to the plain language of *Arroyo* and to the reading given *Arroyo* by the Fifth Circuit in *Snider* v. *All State Administrators, Inc.*, 481 F. 2d 387 (C.A. 5,

1973), *cert. denied*, 415 U.S. 957,[2] and to the views of several Courts of Appeals to the effect that Section 302 does not authorize a civil damage remedy (Petition, pp. 27-30). The Third Circuit's decision in this regard is in irreconcilable conflict with this Court's decision in *Arroyo* and with the views stated by at least five other Courts of Appeals.

By the same token, the Third Circuit's declaration that Section 301 jurisdiction extends beyond breach of contract to claims sounding in tort and asserting fiduciary breach conflicts with numerous decisions of other Courts of Appeals as set forth in the Petition (Petition, pp. 32-38). Here too, Respondents' strategy in this Court is apparently to disassociate themselves from the more untenable aspects of the Court of Appeals' decision. That this is so is plain from a comparison of the views stated by the Court of Appeals regarding the

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[2] Respondents attempt, contrary to the Third Circuit's acknowledgment of conflict, to harmonize *Snider* with the decision below on the grounds that the *Snider* court, though affirming the trial Court's refusal to exercise pendent jurisdiction in that case, stated that pendent jurisdiction could have been exercised (Respondents' Br., pp. 11-12). While allegation of a currently-existing structural violation of Section 302 could have justified exercise of pendent jurisdiction in *Snider*, the refusal to exercise such jurisdiction should *a fortiori* have been affirmed in this case where the only ostensible structural violation had been corrected before any assertion of jurisdiction under Section 302(e) was made. *Snider*, as the Court of Appeals recognized, held Section 302 jurisdiction strictly limited by the terms of Section 302(e). The Court of Appeals' holding here that Section 302(e) jurisdiction could be successfully—or even substantially—invoked by way of a damage claim asserting a structural violation which had ceased to exist is manifestly in conflict with *Snider* as well as the decisions of several other circuits as set forth in Petition.

scope of Section 301 jurisdiction (6a-12a) with Respondents' statements in their Brief that they "do not assert that § 301(a) establishes subject matter jurisdiction over claims for improper administration of union trust funds" and that it is "suits for violation of collective bargaining agreements with which § 301(a) is concerned. . . ." (Respondents' Brief, p. 13). That Respondents themselves disavow the Court of Appeals' untenable jurisdictional theory could not be more clear. Respondents' argument with respect to Section 301 proceeds with a *non sequitur* to the effect that "in the instant action there is no question that there was pervasive violation *by the operators* of the provisions of the collective bargaining agreement." (Emphasis added) (Respondents Br., p. 13). Contract violations by the operators would undoubtedly support jurisdiction of a derivative action by the pensioners against the operators for collection of the royalties, *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1963). However, as the Third Circuit held in its earlier decision, *Nedd* v. *United Mine Workers of America*, 400 F. 2d 103 (C.A. 3, 1968) and reaffirmed in the present decision (7a, fn. 7), the operators' violations do not support jurisdiction of a Section 301 claim against the union.

Along the same line, the Court of Appeals' declaration that the duty of fair representation can extend to persons outside the bargaining unit whose benefits are not even mandatory subjects of collective bargaining is in inevitable conflict with this Court's decision in *Pittsburgh Plate Glass*. That decision makes perfectly plain that the duty is not owed to persons outside the bargaining unit and does not arise as a consequence of voluntary industry practices acceding to negotiation over such persons' benefits as permissive bargaining subjects. Again, the Respondents do not even purport to defend the Court of Appeals' reliance on *Railroad*

Trainmen v. *Howard*, 343 U.S. 768 (1952) nor to rebut the discussion of that case in the Petition (Petition, pp. 41-42). Their assertions that the duty necessarily arises where permissive bargaining occurs is contrary to this Court's clear explanation that the consequence of such bargaining is *contractual* protection for the specific rights conferred on extra-unit individuals by way of permissive bargaining (Petition, p. 45 & fn. 27). Similarly, Respondents are simply wrong in their assertion that the "duty 'to balance the interests of all its constituents' is precisely what [a union's] duty of fair representation is all about" (Respondents Br., p. 9). Unions remain free under the federal labor laws to make their own rules for admission and maintenance of membership, 29 U.S.C. 158(b)(1)(A), and may choose to admit to membership all manner of persons who do not happen to be employed within a union-represented bargaining unit. The statutory duty of fair representation, however, arises only as a result of the union's exclusive representative status and extends to persons employed within such units whether or not they happen to be union "constituents".

Finally, as set forth in the Petition (Petition, pp. 46-49) and not even addressed by Respondents, the Third Circuit's disposition of threshhold issues bearing on the union's liability under the various federal theories and its entitlement to credit for loans to the Fund is contrary to decisions of this Court and of other Courts of Appeals. Manifestly, Respondents could not address this portion of the Petition and still maintain their strategy of contending that the Third Circuit's holding was solely addressed to pendent jurisdiction. Nor could they address this portion of the Petition consistent with their overall strategy of seeking to obscure the immense benefits accruing to the Fund by way of its close relationship with the UMWA through the

nearly $10 million dollars of loans advanced so that pension payments could continue without interruption.

C. Rather than diminishing the prospective impact of the decision below, the enactment of ERISA underscores the urgency of granting review to restrict judicial development of federal common law standards for pension trust administration which could potentially conflict with federal statutory and administrative standards.

Respondents are plainly incorrect in suggesting that the Court of Appeals' decision lacks significance in view of the enactment of ERISA. The Court of Appeals' decision is rife with implications both within and without the area of pension fund regulation. Within the pension area, the Third Circuit's decision adds a third body of substantive law to the pre-emptive federal standards prospectively applicable under ERISA and to what had otherwise been recognized as the state fiduciary standards applicable to pre-ERISA cases. The Court of Appeals' decision—unnecessarily and confusingly—interjects a compound body of substantive law not deriving decisively from either state or federal standards (26a & fn. 31). Such a result would be undesirable even if the decision's implications were confined to the area of pension regulation which they obviously are not. The Court of Appeals' purported recognition of Section 301 jurisdiction over claims asserting tortious interference with contractual relations—rather than breach of contract—promises to open the federal courts to a wide variety of suits having nothing to do with pension regulation which had not hitherto been subject to Section 301 jurisdiction. The same is true of the Court of Appeals' declaration of an implied damage remedy under Section 302(e). It is perhaps most plainly true of the Court of Appeals' purported extension of the duty of fair representation to persons who are not "employees" in the sense of the Act, 29

U.S.C. 152, and not situated within a union-represented bargaining unit.

CONCLUSION

For the reasons stated in the Petition and herein, review of the Court of Appeals' decision should be granted and the decision below reversed.

Respectfully submitted,

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